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**IN THE  
SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1948**

**No. 663**

**ROBERT MOORE, RICHARD McCOARD,  
GEORGE SHERRAD, and JOE PIM-  
ENTEL,**

*Petitioners,*

**v.**

**THE PEOPLE OF THE STATE OF  
CALIFORNIA,**

*Respondent.*

**BRIEF OF RESPONDENT IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI TO THE DISTRICT COURT  
OF APPEAL OF THE STATE OF CALIFORNIA, THIRD  
APPELLATE DISTRICT**

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**In the Supreme Court**  
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**UNITED STATES**

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**No. 663**

**ROBERT MOORE, RICHARD McCOARD,  
GEORGE SHERRAD, and JOE PIM-  
ENTEL,**

*Petitioners,*

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**THE PEOPLE OF THE STATE OF  
CALIFORNIA,**

*Respondent.*

**BRIEF OF RESPONDENT IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI TO THE DISTRICT COURT  
OF APPEAL OF THE STATE OF CALIFORNIA, THIRD  
APPELLATE DISTRICT**

**I. STATEMENT OF THE CASE**

Petitioners have requested a writ of certiorari to the District Court of Appeal of the State of California, in and for the Third Appellate District, to review the decision of the state court affirming the judgment of the Superior Court of the State of California, in and for the County of Mendocino, which found petitioners guilty of the crimes of riot and of assault with a deadly weapon. Pursuant to convictions under certain counts of the indictment, sentences were imposed by the trial court to run concurrently in the California State Penitentiary at San Quentin on the assault

charges and in the county jail of Mendocino County on the riot charges (Tr. 606-617).

The judgment of the District Court of Appeal sought to be reviewed was entered September 28, 1948 (Tr. 618-624), and reported in 87 Advance California Appellate Reports, 846. A petition for rehearing in said court was filed by petitioners herein (Tr. 624-632). The district court issued a modification of its opinion. The opinion with this modification was approved and the petition for rehearing was denied (Tr. 633) (87 Advance California Appellate Reports, 1024). A petition for hearing in the California Supreme Court \* was filed by petitioners and denied by said court on October 28, 1948 (Tr. 655), and the decision of the District Court of Appeal became final.

In view of the inaccuracies contained in the petitioners' statement of the case, their failure to adopt the facts set forth in the appellate court's opinion and their incorporation of argumentative material in the statement, we deem it necessary to set forth an additional statement pursuant to Section 4 of Rule 27 of this court.

Defendants and petitioners herein were members of the Lumber and Sawmill Workers Union, affiliated with the United Brotherhood of Carpenters and Joiners of America, A. F. of L. The members of the union were engaged in a labor dispute between their

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\* It should be noted that the statement (p. 4, Petition for Writ of Certiorari) that the appeal from the Mendocino County Superior Court was taken to the California Supreme Court is erroneous, as under the California Constitution, (Article VI, Section 4b) the District Court of Appeal has original appellate jurisdiction in criminal cases on questions of law alone from the superior court except in cases in which a judgment of death has been rendered.

union and certain redwood lumber companies in Mendocino County, California. Picketing had been conducted since the middle of January, 1947, at the Richardson Lumber Mill and was discontinued when an agreement was reached and signed in April (Tr. 115, 145).

On the day in question and at the time of the incidents there were over 30 pickets at the sawmill (Tr. 78-79, 283). One group, about 20 in number, was standing at the east entrance to the mill; another group of about 15 pickets took station by the west entrance, some 500 feet distant from the first group (Tr. 34, 78-79). Eight of the nine victims of the alleged assaults were nonunion employees of the mill; the ninth, Kenneth Jackson, was an individual who had gone to the mill to buy lumber (Tr. 65, 96, 139, 144, 173, 185, 191, 202, 249, 290). Four of the complaining witnesses, Pullen, Henderson, Jackson, and Tennison, entered directly by the east entrance to the mill (Tr. 35, 100, 156, 191). Four of the complaining witnesses, Schwartz, Wise, May, and Johnson, entered by the west entrance (Tr. 50, 90, 127, 165, 192).

Complaining witness Pullen arrived at the mill at approximately 5 minutes to 8. He was hit by rocks coming through the windshield which showered glass in his face and his car was damaged (Tr. 40-45). Ray and Gibson, witnesses to the assault, testified that defendant Moore was an assailant and Gibson also stated that Sherrad was an assailant (Tr. 154, 189).

Complaining witness Schwartz arrived at the mill a few minutes before 8 by the west entrance (Tr. 50). The pickets on the road threw rocks, broke the glass in his car and otherwise damaged his automobile (Tr. 50). The witness stated that Moore and McCoard threw rocks at him (Tr. 54). This testimony was corroborated by Gibson as to defendants Moore, Sherrad, and Pimentel (Tr. 189), and by Wise as to Pimentel, Sherrad, and Moore (Tr. 89). Richardson and May also testified that Moore threw rocks at Schwartz (Tr. 142-145). Ray testified that Moore, Pimentel, and Sherrad threw rocks at Schwartz (Tr. 155).

Complaining witness Gibson arrived at the mill at approximately 7.52 a.m. on February 4, 1947 (Tr. 177). Rocks were thrown at his car, which broke his windshield and hit the glass on the door. Approximately 12 rocks in all hit the car (Tr. 179, 181). This witness, who sustained head injuries (Tr. 179, 182), testified that when he went past the east entrance to the mill Sherrad and Moore threw rocks at him (Tr. 178-179). This statement was corroborated by Ray (Tr. 154.)

Complaining witness Wise arrived at the west entrance to the mill at approximately 7.55 a.m. (Tr. 78). Pickets threw rocks at the car, broke the glass on the right front door and half of the windshield (Tr. 80). Wise testified that Moore, Sherrad, and Pimentel threw rocks at him (Tr. 85, 89).

Piper, a passenger with Wise, was injured by flying glass. He testified that he recognized Moore as the picket who threw the rock through the windshield (Tr. 109). The witness Gibson stated that Moore, Pimentel, Sherrad, and McCoard threw rocks at Wise, and witness Ray identified Moore and Pimentel also as throwing rocks at Wise (Tr. 155, 162, 191, 201).

Mr. Henderson arrived at the mill at approximately 7.50 a.m. by the east entrance (Tr. 100). As he turned in to this entrance one rock struck his car and other rocks were falling around (Tr. 102, 108). About 10 or 12 rocks were thrown at the car, one of which shattered the windows (Tr. 102). Although Henderson did not recognize the people who threw rocks at the car Ray and Gibson testified that they recognized Moore, Pimentel, McCoard, and Sherrad as throwing rocks at Henderson (Tr. 155, 156, 193).

Complaining witness May arrived at the mill in a jeep driven by Blosser at approximately 7.46 a.m. (Tr. 127). They drove in the west entrance at which time rocks were thrown through the plastic glass curtains of the jeep. May was cut above the eye necessitating 7 stitches being taken (Tr. 128). Four rocks hit the jeep and Gibson, who witnessed the assault, testified these rocks were thrown at May by Pimentel, Moore, and McCoard (Tr. 192). Ray testified that in addition to Moore and Pimentel, Sherrad also threw rocks at May's car (Tr. 157).

Complaining witness Tennison arrived at the mill at approximately 7.58 a.m. on February 4, 1947 (Tr.

120). Rocks were thrown at his car, one of which glanced off the windshield on the driver's side and hit the door. Another hit the corner of the back door glass and one scraped the top and front fender (Tr. 122). Approximately 6 rocks were thrown at Tennison's car and he identified one as having gone through the back vent glass (Tr. 120).

Ray identified Moore and others throwing rocks at Henderson while they were standing by the east corner of the mill and he further stated that he saw Pimentel throwing rocks (Tr. 157-158). Gibson identified Moore, McCoard, Sherrad, and Pimentel as having thrown rocks at Tennison and Wise identified Pimentel as taking part in this assault (Tr. 91, 193).

Some of the stones found in certain cars were identified and received in evidence (Tr. 41, 47, 80, 123). Photographs of the cars taken immediately after the assault, showing the broken windows, the dents, and damages to the cars, were explained by the witnesses and received in evidence after foundations therefor had been adequately laid (Tr. 40, 51, 83, 105, 121, 181). Various complaining witnesses testified as to the injuries received (Tr. 47, 128, 182, 183). After the deputy sheriff arrived there was a dispute between the workers and the pickets about the affray and the damage to the machines. Gibson testified that he heard Moore and Sherrad say, "Bring the sheriff's car around. We will do the same thing to them." (Tr. 196)

The chief of police encountered difficulty in securing the necessary identifications. This arose from the

complaining witnesses' fear of the belligerent attitude adopted by the pickets, as evidenced by the language used by Moore when confronted by the complaining witnesses (R. T. 284).

The evidence further shows that the number of pickets previously engaged in picketing had been greatly increased on the morning in question and that the pickets greatly outnumbered the 14 or so nonunion workers then engaged in the mill.

## ARGUMENT

### Summary of Argument

- I. The Decision of the Court Below Did Not Violate Petitioners' Rights Under Either the First or Fourteenth Amendments as Neither the Right to Peaceful Picketing Nor the Question of Free Assemblage Was Involved Herein.
  - II. Defendants Were Convicted on Proof of Their Own Acts in Violation of the Provisions of Sections 404 and 245 of the California Penal Code.
  - III. The California Courts Did Not Deny to Petitioners Their Constitutional Right to a Presumption of Innocence.
- I. The Decision of the Court Below Did Not Violate Petitioners' Rights Under Either the First or Fourteenth Amendments

Under petitioners' first specification of error the point is raised that they were denied due process of law in that the court below assumed guilt of any or all present for acts of violence committed by some only.

The opinion of the District Court of Appeal of the State of California clearly shows that this contention of the petitioners herein is incorrect (Tr. 618-624). Petitioners were convicted upon proof of their own

acts in violation of Sections 404 and 245 \* of the Penal Code of the State of California. There was no assumption made by the district court that "picketing was unlawful"—the issue of peaceful picketing or free assemblage not being before the court. What did engage the court's attention were the acts of violence committed by these petitioners contrary to the public peace of the State of California. Accordingly, it is immaterial that petitioners herein might have been engaged in peaceful picketing prior to the commission of the offenses. Under neither the federal nor California cases has the commission of a criminal act been condoned because it arose out of a labor dispute.

*Lisse v. Local Union No. 31*, 2 Cal. 2d 312, 323, 41 P. (2) 314;

*In re Bell*, 19 Cal. 2d 488, 122 P. (2) 22;

*Carlson v. California*, 310 U. S. 106, 84 L. Ed. 1104, 60 S. Ct. 746;

*Milk Wagon Drivers U. v. Meadowmoor Dairies*, 312 U. S. 287, 85 L. Ed. 836, 61 S. Ct. 552.

It is apparent that the cases cited by petitioners do not support their claim of deprivation of due process. *A. F. of L. v. Swing*, 312 U. S. 321, 85 L. Ed. 855, *Thornhill v. Alabama*, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 and *Milk Wagon Drivers U. v. Meadowmoor Dairies*, 312 U. S. 287, 85 L. Ed. 836, 61 S. Ct. 552, all relate to state statutes involving picketing. In this matter, however, picketing is not the issue, but crimes of violence contrary to the peace of this State.

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\* Sections 404 and 245, Penal Code, set forth in appendix hereto.

Due process of law in a criminal case requires a law creating or defining the offense, a court of competent jurisdiction, accusation in due form, notice and opportunity to defend, trial before an impartial judge or judge and jury, and a right to be discharged unless found guilty (16 *Corpus Juris Secundum* Sec. 579, p. 1171-1172). Where these conditions are fulfilled there is no violation of the guaranty of due process of law.

Such is the situation in the instant matter. Defendants were charged with the offense of riot, a violation of Section 404 of the Penal Code, and with the offense of assault with a deadly weapon, a violation of Section 245 of said code. The jury was fully instructed on the charges contained in the indictment and the defendants were found guilty of certain of those charges. The District Court of Appeal found that the evidence adduced fully supported the verdicts of the jury.

Under California law the liability of a defendant for a criminal act is fixed by the provisions of Sections 31 \* and 971 \* of the Penal Code whereby all persons concerned are principals whether they participate directly in said crime or aid and abet its commission (*People v. Best*, 43 Cal. App. 2d 100, 110 P. (2) 504, cert. denied, 314 U. S. 609). Conspiracy or concert of action comprehend nothing that is not included in the definition of "who are principals" (*People v. Le Grant*, 76 Cal. App. 2d 148, 172 P. (2) 554).

That these petitioners by throwing rocks did "assist," "supplement," and "excite" other partici-

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\* Sections 31 and 971, Penal Code, set forth in appendix hereto.

pants in the affray, cannot be doubted; therefore, by the very acts which made them principals in and to the assaults charged, they aided and abetted all other principals, becoming themselves accessories thereto. Joint participation with those engaged in the commission of a wrongful act is strong evidence of aid and assistance. The standing shoulder-to-shoulder, one with the other, in active armed attacks on the complaining witnesses in this matter is certainly evidence of effective encouragement and assistance (*People v. Le Grant*, 76 Cal. App. 2d 148, 153, 172 P. (2) 554). Nowhere in the record can justification be found for the statement of petitioners that the California courts assumed the guilt of any and all present at the time in question merely because they were engaged in picketing.

Finally, it should be noted that petitioners' point that the application of Section 31 of the Penal Code to their situation resulted in a deprivation of their rights under the Federal Constitution was first raised in their petition for rehearing in the District Court of Appeal of the State of California. That court, and later the State Supreme Court, properly declined to entertain the question. Therefore, it is apparent that a federal question of substance was not properly raised in the state courts as the interpretation placed on Section 31 by the state courts was in accord with

long established law and not one which was unanticipated by petitioners.

*Herndon v. Georgia*, 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530;

*People v. Wade*, 71 Cal. App. 2d 646, 163 P. (2) 59;

*People v. Ojeda*, 132 Cal. App. 593, 23 P. (2) 316;

*People v. Marty*, 59 Cal. App. 503, 210 P. 964;

*People v. Ho Kim You*, 24 Cal. App. 451, 141 P. 950.

In the instant matter it is submitted that the record does not show a denial of due process and the petition should be dismissed for want of a properly presented federal question.

*Bailey v. Anderson*, 326 U. S. 203, 90 L. Ed. 3.

## II. Defendants Were Convicted on Proof of Their Own Acts in Violation of the Provisions of Sections 404 and 245 of the California Penal Code

The evidence hereinabove set forth, and reflected in the decision of the District Court of Appeal, clearly establishes defendants' activity in the affray. Not only was there direct testimony to such effect by the complaining witnesses, but ample corroboration by Gibson, Ray, and Richardson. Contrary to the contention of the defendants herein, no vicarious liability was fastened upon them, but a direct, personal liability for their own acts of violence. (See decision of the District Court of Appeal, Tr. 619-622.)

The original transcript in this matter contained some 900 pages of evidence. True, there were conflicts in this evidence; however, such conflicts were resolved against the defendants and petitioners herein by the jury (Tr. 622) and affirmed on appeal.

*People v. Newland*, 15 Cal. 2d 678, 104 P. (2) 778;  
*People v. Perkins*, 8 Cal. 2d 502, 66 P. (2) 631;  
*People v. Tom Woo*, 181 Cal. 315, 184 P. 389.

We submit that the foregoing determination by the triers of fact was not so lacking in evidentiary support that to give it effect would work that fundamental unfairness which is at war with due process; therefore, this court is not warranted in refusing to accept such determination.

*Lisenba v. California*, 314 U. S. 219, 86 L. Ed. 166,  
62 S. Ct. 280.

In the case of *Milk Wagon Drivers U. v. Meadowmoor Dairies*, 312 U. S. 287, 85 L. Ed. 836, 61 S. Ct. 552, this court speaking through Mr. Justice Frankfurter stated:

“It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the state of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guaranty here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our

judgment for that of the state court is to transcend the limits of our authority. And to do so in the name of the Fourteenth Amendment in a matter peculiarly touching the local policy of a state regarding violence tends to discredit the great immunities of the Bill of Rights. No one will doubt that Illinois can protect its storekeepers from being coerced by fear of window smashings or burnings or bombings."

In the present case, as well as in the companion case of *People v. Bundte*, 87 Advance California Appellate Reports 829, the District Court of Appeal found:

"There was no variance between the allegations of the indictment and the proof adduced with relation to the acts, conduct or weapons used in committing the assaults or the riot. No weapons except rocks were used. The foundation for receiving in evidence the rocks found in the cars or in their immediate vicinity, the photographs of the rocks and of the damaged automobiles, was satisfactorily laid."

As was stated in the case of *Lisenba v. California*, 314 U. S. 219, 227, 228, 86 L. Ed. 166, 62 S. Ct. 280, 286:

"\* \* \* The Fourteenth Amendment leaves California free to adopt a rule of relevance which the court below holds was applied here in accordance with the State's law."

Referring to the cases cited by petitioners in support of their contention that they were convicted by

proof of acts of others not proof of their own acts, we find that each of their cases are factually distinguishable and presented the court with no comparable situations.

In *Kotteakos v. U. S.*, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557, the prosecution was in a federal court for a conspiracy to violate the National Housing Act. The court held that the evidence showed more than one conspiracy and that the jury could not possibly have found only one conspiracy, therefore, the trial court erred in instructing the jury that only one conspiracy was shown and that the acts and declarations of one conspirator bound all. In *De Jonge v. Oregon*, 299 U. S. 353, 57 S. Ct. 255, 81 L. Ed. 278, a conviction for violation of Oregon's Criminal Syndicalism Law was reversed. There it was held that a conviction under such statute for participation in a public meeting, otherwise lawful, merely because it was held under the auspices of an organization which advocated use of violence to effect political change although no such teaching was made at the meeting in question violated the right of free speech and assemblage. In *Hague v. C. I. O.*, 307 U. S. 496, 83 L. Ed. 1423, 59 S. Ct. 954, this court held an ordinance forbidding the distribution of printed matter and the holding of meetings in streets and public places without first obtaining a permit violated the right of free speech and was void. In the case of *Cole v. Arkansas*, 333 U. S. 196, it was held a violation of due process for the State Supreme

Court to sustain the conviction of appellants under another penal section than that under which they were charged, tried, and convicted as the two sections described separate and distinct offenses. *Glasser v. U. S.*, 315 U. S. 60, 86 L. Ed. 680, merely affirmed a well-settled rule of law with respect to proof of conspiracy that the declarations of a conspirator were not admissible against an alleged co-conspirator who was not present when they were made unless there is proof *aliunde* connecting the latter with the conspiracy.

In *Ashcraft v. Tennessee*, 322 U. S. 143, 64 S. Ct. 921, 88 L. Ed. 1192, *Chambers v. Florida*, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716, *White v. Texas*, 310 U. S. 530, 60 S. Ct. 1032, 84 L. Ed. 1342, and *Brown v. Mississippi*, 297 U. S. 278, 80 L. Ed. 682, we find that convictions based on confessions obtained by the use of the third degree were reversed as a violation of due process.

It is apparent that a review of these cases discloses a far different situation obtaining than in the instant matter. There were no third degree confessions involved, no variance between the crimes charged and the proof thereof, and no void statutes involved in this case. The question of the admissibility of evidence is for the state court to determine (*Lisenba v. California*, 314 U. S. 219, 228-229, 86 L. Ed. 116, 62 S. Ct. 280, *Snyder v. Massachusetts*, 291 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674).

Due process of law is process due according to the law of the land. This process in the state is regulated

by the law of the state and the due process clause of the Fourteenth Amendment does not control mere forms of procedure in state courts or regulate practice therein.

*Holden v. Hardy*, 169 U. S. 366, 18 S. Ct. 383, 42 L. Ed. 780;

*Hurtado v. State of California*, 110 U. S. 516, 4 S. Ct. 111, 121, 28 L. Ed. 232;

*Twining v. New Jersey*, 211 U. S. 78, 112, 29 S. Ct. 14, 53 L. Ed. 97.

Thus, it is submitted that the petitioners have failed to establish in any respect that the action of the state courts deprived them of due process of law; on the contrary, reference to the record clearly establishes that they were convicted on proof of their own acts in violating the California statutes as charged.

### III. The California Courts Did Not Deny to Petitioners Their Constitutional Right to a Presumption of Innocence

The defendants and petitioners herein were charged with riot and also with having committed assaults by throwing rocks at some nine different given and named persons. The record is replete with evidence as to their having so acted. There was no assumption indulged in by the trial court that anyone but the State bore the burden of proving the indictment laid against defendants and petitioners. That the State so fulfilled its obligations is borne out by the record and also by the decision of the District Court of Appeal of the State of California which painstakingly

set forth the evidence in support of the verdict of the jury and the judgment of the trial court. The State did not rely on the presumption that the defendants and petitioners herein by their mere presence at the time and place of the acts in question were *prima facie* guilty thereof but by direct evidence, as set forth in the statement of the case herein, proved that the defendants were guilty of the offenses charged against them. Neither the cases cited by petitioners nor a review of the record will substantiate the position taken by petitioners in the instant matter. Therefore, it is submitted that this contention of petitioners is entirely without merit and completely refuted by the record.

### CONCLUSION

Upon the record and for the reasons stated we sincerely believe that the defendants and petitioners herein have not stated a federal question of substantial importance warranting this court in issuing the writ prayed for. As found by the District Court of Appeal in its opinion "the defendants received a very fair and impartial trial. The jury was fairly and fully instructed on all material issues. We are satisfied there was no miscarriage of justice." The matter was decided pursuant to the well established principles of California law in interpreting the provisions of Section 31 of the Penal Code, and the application of said code section to the facts involved in the instant matter did not deprive the petitioners of due process of law

guaranteed by the Federal Constitution. The question of peaceful picketing and the right of free assemblage have no place in the instant matter where, as the facts disclose, the sole issue was the use of force and violence by the defendants and petitioners herein to disturb the peace of the State of California.

It is, therefore, respectfully submitted that the petition for writ of certiorari in the instant matter should be denied.

Respectfully submitted,

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Dated, Sacramento  
May 9, 1949

## APPENDIX

### *California Penal Code, Section 31*

All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed.

### *California Penal Code, Section 245*

Every person who commits an assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury is punishable by imprisonment in the State prison not exceeding ten years, or in a county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment.

### *California Penal Code, Section 404*

Any use of force or violence, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two

or more persons acting together, and without authority of law, is a riot.

*California Penal Code, Section 971*

The distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment or information against such an accessory than are required in an indictment or information against his principal.

